JUDICIAL TECHNIQUE IN TAKEOVER LITIGATION IN AUSTRALIA*

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I. INTRODUCTION

It is a truism that the form and content of law is likely to be heavily influenced by the attitudes and experiences of legal practitioners and judges. Australian corporate law in general, and particularly the law relating to takeovers and the interpretation of the Companies (Acquisition of Shares) Act 1980, provides an interesting illustration of this fact. This can also be seen from a cursory reading of the 80 or 90 reported cases which have dealt with this body of legislation. However, most takeover cases are unreported as they tend to involve very minor issues of law which are usually dealt with by resort to interlocutory applications. Very often, the litigation which arises in this area is primarily tactical in nature, rather than involving substantive legal issues which the parties are determined to have decided. Takeover litigation rarely leads to an appeal and many cases are settled before a final judicial resolution is reached. Moreover, such litigation cannot be adequately understood without reference to the commercial context in which the cases arise. For this reason, the backgrounds of judges are seen by many to be important in the processing of such cases. The level of commercial experience of judges is often seen to be an influential factor in achieving commercially sensible results from the courts. Other factors, however, also influence the kind of results achieved

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through takeover litigation. The most important of these include the role of the legal profession in disciplining the bench in commercial cases, the predominant ideology of legalism which is found amongst judges and lawyers in commercial cases and the drafting of the Takeovers Code itself is an important factor in influencing the parameters of judicial action in this area of law.

This article seeks to explore these issues by reference to findings drawn from an empirical study involving 20 of Australia's most senior commercial law judges, as well as 28 experienced takeover lawyers. The study also sought to elicit the views of senior corporate executives, merchant bankers and regulators. As Table A illustrates, a total of 82 of the leading actors in contemporary takeover litigation in Australia were interviewed. These interviews took place in four Australian capital cities and each tended to be up to two hours in duration, and were based upon an open ended interview schedule. The findings from this policy oriented study bring together for the first time insights about the nature of takeover litigation, and the judicial predisposition to it, which is not available from the study of the limited case-law in this area. In many ways, this study reflects takeover "law in action", to use a well used phrase. Findings from this study also, more generally, cast light upon the nature of judicial technique in statute based areas of commercial law in Australia.

TABLE A: GEOGRAPHIC DISTRIBUTION OF TAKEOVER LITIGATION INTERVIEWEES

	Sydney	Melbourne	Perth	Canberra
Judges	8 (a)	5	6 (b)	1
Queen's Counsel	3	3	4	1
Solicitors/Partners (c)	4	5	5	3
Senior Executives	4	4	1	0
Merchant Bankers (d)	3	2	1	0
Regulators	2	6	5	5
Miscellaneous	0	0	0	1
TOTAL	24	25	22	11

(a) This figure includes two Federal Court judges in Sydney. All other judges were Supreme Court judges

(b) This figure includes one Federal Court judge. All others were Supreme Court judges

(c) In unified professions, this refers to persons primarily practicing in the style of a solicitor

(d) Most of these persons were also trained as lawyers

II. JUDICIAL BACKGROUND IN TAKEOVER CASES

It is sometimes said that the courts are inappropriate forums for the handling of complex commercial cases such as those involving takeovers, especially in view of the expedition which the handling of these cases requires. In support of this argument, it is said that judges are poorly equipped to handle these types of cases because they are not in tune with "the commercial realities" involved in such cases. It has also been suggested from time to time that the judges hearing takeover cases have been too legalistic in their approach and as a consequence the wider implications of takeovers are not taken into account by the courts. We sought to explore these and other propositions in this study.

We asked the lawyers whether "judges understand enough of the commercial realities to appreciate the real issues involved in takeover litigation?" There were very mixed views on this issue. Of the 25 Queen's Counsel and law firm partners who expressed views on this matter, ten agreed with this proposition and ten did not, while five fell someway in between these extreme views. Most of the barristers agreed that judges did understand enough of the commercial realities, and only two thought that they did not. However, this may be because many barristers are themselves out of touch with commercial realities. One law firm partner, who did not think that judges understood enough about the commercial realities, answered "no, and neither does the Bar, they are the most uncommercial people I've ever met. The general rule is that you never know what will happen; takeover litigation is a lottery."

It seems to be the case, as one leading Sydney barrister put it, that "one cannot make a general comment." He went on to add that "some judges may be commercially innocent, but not those in New South Wales." A Perth barrister who began by taking the middle road observed that "some do, some don't. You are more likely to get a judgment based on technical grounds from a non-commercial judge. The judges cannot rely on the law; they need commercial experience." Another middle of the road view was put by a solicitor who observed that judges understood commercial realities "from the legal viewpoint but not from the business viewpoint." Sometimes this commercial experience can come from sitting on a commercial law or equity list for some time. It was often said that good judges without much previous commercial experience quickly developed

an adequate grasp of the commercial realities by hearing cases on such lists. As one Melbourne barrister reported, "many judges have no idea of the real world. Lawyers are becoming more commercial and it may be that judges will learn from sitting on the commercial list." A Perth barrister also noted that "to be a good judge you have to be a good lawyer and have wisdom from experience. Hearing a lot of cases will substitute for personal experience." He qualified this by observing that some judges "are wrong because they don't understand the commercial practice and some are opposed to capitalism in general."

Many saw it as being the task of the barrister to explain the commercial realities to the judge and a Sydney barrister noted, in respect of the equity judges in NSW that "they do a surprisingly good job. It is the role of counsel to explain the commercial realities to the court." Few barristers seem to have the kind of commercial experience of large law firm practitioners and, even where they may do so, it is not always clear that the barristers in takeover cases are fully informed of the underlying commercial motivations of their clients. Even where they are so informed, they may be reluctant to divulge these motivations to the court, even though, as one Melbourne law firm partner noted, "it is the role of counsel to inform the court." It is noteworthy that an experienced commercial law judge also told us that he only became aware of the real commercial issues at stake in a case some months after the completion of the case and that he became so aware only through gossip at his club.

The capacity of judges to deal with the commercial issues behind the case can be adversely affected by a number of other considerations which are beyond a judge's control. As an experienced Perth lawyer observed, for example, the lack of sufficient commercial understanding upon the part of judges was "understandable given the wide range of cases they have to deal with." He added, that "the judges have to painstakingly come to grips with badly drafted legislation and they can be distracted and confined by counsel." Moreover, it is doubtful that the parties are all that interested in having the judge consider the underlying commercial realities. One Melbourne firm lawyer explained that "you want the judges to consider legal and not commercial issues. Some facts are not put to the court." A Perth lawyer succinctly put this point, when he observed that "the parties bring the litigation and not the commercial issues to the court."

The corporate regulators in the Corporate Affairs Commissions and the National Companies and Securities Commission were also fairly divided in their views, although most thought that the picture was not clear-cut. At one extreme was the view put by a regulator who pointed out, "I have seen cases where judges have not understood a word of the case. Most judges have no commercial background; those who have been commercial barristers are better." Another regulator noted that "judges are naive in commercial matters. The judges do not have much idea about market place realities." Despite a lack of recent or extensive commercial

experience, individual judges were seen to be "fairly pragmatic." Regulators took the view that judges who had had commercial experience through hearing many commercial cases were better. As one regulator saw it, "those who have had a year or two in commercial causes understand the issues, they may not understand the actors." This may be because of the nature of the proceedings themselves, for as one regulator explained, "I don't think that the adversary system of litigation allows the real issues to come forward." Another regulator noted that even where judges did understand the commercial realities they "don't always get it right." This was because "the parties don't go into court and say 'this is an action to raise the price and discredit the other party.' A good judge will see this." Nevertheless, one official observed that "there are not too many crook decisions. One may find other ways to succeed if you get a bad decision. The judges are there to administer the law; do they need commercial expertise?"

Merchant bankers were perhaps the most critical of the handling of takeover cases by superior court judges. Many of the merchant bankers interviewed also had experience in legal practice prior to becoming merchant bankers. One Sydney merchant banker observed that the problem was "not a lack of commercial experience but a lack of knowledge of commercial law. There is a need for familiarity and thoughtfulness which a lot of judges don't have; many come to the Code with leaden feet." A Melbourne merchant banker thought that the lack of commercial experience of judges "increases the likelihood of litigation." This was because "it is like Russian roulette; you may have a good case, but before a bad judge you can still lose. Consequently, people are more inclined to go to court with a mediocre case." The most damning comment was made by an merchant banker, who had had much experience in takeover litigation, when he observed in respect of takeover matters: "I don't think that judges learn, judges just accept."

III. THE VIEW FROM THE BENCH

It is interesting therefore to turn to the views expressed by the judges themselves in this regard. We asked them whether it mattered to the outcome of takeover litigation that a judge may have, as many clearly see it, little understanding of the commercial realities involved in these cases? Only four judges thought that it did not matter to the outcome of cases if they did not have much commercial experience. Although most judges thought that this did matter, the arguments of the minority would no doubt also find some support from those who took the opposite view. The three positions which can be readily discerned amongst the judges might be described as first, the 'judges only apply the law' argument; secondly, the 'you can learn on the job' argument; and thirdly, the 'judges must be specialists' argument.

A. THE 'JUDGES ONLY APPLY THE LAW' ARGUMENT

One of those who answered that it did not matter that a judge did not have commercial experience, observed that "this is another way of saying that the courts are legalistic." However, he went on to assert that "if it is a good point it will prevail. Litigation is not designed to provide a commercially realistic answer. The Court's role is not to give the best commercial judgment, you need a bureaucratic mechanism for that." This position was elaborated upon by another Sydney judge, when he replied that "I don't think this is a problem. The expertise of judges is in the law. It is the responsibility of counsel to put the economic issues before the court; the judge's responsibility is to decide on the evidence." A very experienced commercial judge told us that "this is not a problem. After a while you get some commercial knowledge. They [takeover cases] involved legal problems as far as I was concerned." Although this was not his view, another judge observed that "many judges say this is not our business, we are here to interpret." Such a view was put even more emphatically by another experienced Supreme Court judge, when he answered, "I don't think it matters; it might even be better if they ignored the commercial realities. The parties only come to court when they think there has been a breach of the Code."

B. THE 'YOU CAN LEARN ON THE JOB' ARGUMENT

Some judges took what might be described as an intermediate view. As one experienced Melbourne commercial law judge observed, "it is a matter of degree. Every judge who works in this area tries to keep up with the commercial realities. If you sit on the commercial list for a term you will stay in touch. This raises the vexed question of judicial specialization." Another way of expressing this view was put by a Western Australian judge when he observed that "it is good to have commercially able judges to inspire the business community and to assist the judges themselves. However, it is not essential as judges are always dealing with cases they have never had before." He added confidently that "there would not be many judges who would not understand the commercial realities." Another judge, who took the view that it did matter to the outcome of a case if a judge had no previous commercial experience, went on to add, "but I am not sure how much it matters; maybe it only slows things down." Presumably, in time and with experience in hearing such cases, the pace of handling takeover cases would speed up.

C. THE 'JUDGES MUST BE SPECIALISTS' ARGUMENT

This was the predominant single view held amongst the 20 judges interviewed. Put most simply, it was expressed by a Sydney judge when he observed that "there is no use in a legally wonderful result if it is commercially nonsense." As another Sydney judge put it, "a judge without much commercial understanding is a setting for a disastrous case. Judges

need to understand what is not said." In this regard, however, another judge noted that "the adversary system discourages the judge from finding out what he is not told." He also observed that "the judge is often shielded from the commercial realities by the parties. The parties may not want the judge to know the true issues behind the case."

In these circumstances, an independent knowledge of commercial realities in the area of takeovers is clearly quite important. As another judge saw it, "[a] judge needs a lot of experience in a field to be able to apply the law. The parties hide facts; it is the job of the NCSC to bring these matters to the Court's attention." Another judge noted that "it is a limitation of the adversary system that you never know the whole situation." He remarked, however, that "the judge is in a better position to give a just decision if he knows what the parties are doing." For reasons such as these, commercial experience was seen to be an important counter-influence upon the constraints of the litigious process. As another judge pointed out, "it is preferable to have judges who are commercially aware. Takeovers cannot be decided in a vacuum." It was put to us that "the potential for a case to go wrong would be greater if a judge does not have commercial experience." One reason why such experience was important was advanced by one of the judges when he told us that "a judge without commercial knowledge will find his judgments questioned more often."

This brings us to a related question, namely, whether the perceived lack of commercial experience of judges has had an effect upon the development of takeover law in Australia. This was not an easy question to answer, and as one judge observed, "this assumes that the law can be developed." The problem is that many cases in this area are decided upon fairly narrow factual bases. Although many judges working in this area had experience in commercial work as barristers, the actual types of commercial arrangement before the courts may change rapidly over time. This led one judge to conclude that "commercial reality means some knowledge of commercial affairs, some scepticism and a realistic approach to commercial matters." It does not mean however, as another judge noted, "making decisions in economic terms." The consequences of a judge's commercial background may not always be very great, for as one judge pointed out, "commercial experience only allows you to appreciate the issues more quickly" or as another judge suggested, "it may just take longer for a non-commercial judge to reach the same decision."

IV. JUDICIAL METHOD IN TAKEOVER CASES

Related to the question of judicial background and experience in commercial matters, was the issue of the sources to which judges were inclined to turn to for guidance in deciding takeover cases. The answers to these questions showed the extent to which judges were constrained by

legalism and the statutory context in which they had to decide cases. They rarely strayed from largely traditional legal sources in deciding cases, despite their adherence to the view that a commercial understanding of a case was important. In this regard, they were as much captives of the legal profession's expectations of judges and the expectations of the profession's clients, as they were constrained by their own legal training. Judges were also constrained by their limited research capacities and were therefore largely limited to the authorities which the legal profession was prepared or able to cite in argument in takeover cases before the court. North American authorities, for example, were rarely if ever cited, although it might be argued that the vast body of takeover case law in the United States and Canada could be at least of passing interest because of the fact that these laws were responding to similar corporate conduct in relatively similar social structures, despite the existence of different statutory frameworks in Australia and North America. Similarly, the reliance by courts on regulatory agency guidelines was not widely approved of amongst respondents, despite the fact that these may be the product of considerable oversight of the takeover process. Before looking at the views of judges in regard to matters such as these, it is useful to examine the expectations of the other actors in the judicial process.

A. RELIANCE BY THE COURTS UPON NCSC GUIDELINES

If it is the case, as most judges and others agree, that judges should be equipped with an adequate grasp of the commercial realities involved in takeover cases, one issue which arises is the extent to which the courts should supplement their commercial experience by placing reliance upon guidelines prepared by regulatory bodies such as the NCSC in reaching their decisions. This question is important because of the widely expressed view that the parties often seek to keep from the court the real purposes behind the litigation. On the whole, most interviewees took a fairly narrow and not unexpected view of the significance which should be attached to NCSC guidelines in takeover cases. Generally, it was said that as these guidelines are strictly speaking not law, they should play little if any role in the process of decision.

Predictably, regulators placed the greatest value upon guidelines, although even they were quick to point out that they were not binding upon the courts. As one Melbourne regulator observed, "the guidelines seem to be influential, but are not binding. The guidelines are put together after a lot of discussion, they are written in non-legalistic language. Their aim is to tell people how we will administer the law and so influence market behaviour." Another regulator thought that judges did not give sufficient weight to regulatory guidelines relating to takeovers. He added that "they should look at them more, as strict analysis of the law may lead to injustice in that the true issue of the case may be missed. The Victorian Supreme Court is more likely to use the NCSC Guidelines." Another

Melbourne regulator noted however, that different commercial law judges had taken radically different attitudes to the use of such guidelines. He went on to add that "if they are supported by the established law they are okay. They are only guidelines."

A federal regulatory official took a more uncompromising view when he observed that "the judges should not pay them more attention; a guideline is the Commission's law, but a judge if he follows it must first decide if it is correct. The legal profession usually feels that the guidelines are okay." This was not an uncharacteristic view amongst regulators, for quite a number of them pointed out that "in many circumstances, they are not right" or that even if the guideline is referred to, "the NCSC is not always right." It was not unusual to be told, as we were in Western Australia, that "judges tend to ignore the NCSC guidelines" or that they "are rarely referred to as they are not part of the law", although a senior Sydney regulator believed that "judges do have regard to the NCSC's guidelines."

Where regard is had by judges to materials such as NCSC guidelines, this tends not to be done overtly. As one experienced merchant banker observed, "in my experience judges give high regard to NCSC statements, but do not quote them in judgments." Another merchant banker made a similar remark when he told us that judges "do [give weight to materials such as guidelines] but not explicitly." Another experienced merchant banker (but one who was not also experienced as a lawyer) thought that judges should not give weight to such materials as "otherwise politicians would influence the judiciary."

Most Queen's Counsel thought that NCSC guidelines were infrequently taken into account by courts in takeover matters and that this was the correct thing for them to do. As one Sydney silk observed, "the NCSC guidelines are not entitled to any weight. The judges are commanded to give interpretation to the words by reference to the objects of the Act. That is that takeovers should take place in a fully informed market with equality of opportunity to all shareholders." In comparison, a Melbourne silk also answered "no, [judges do not give sufficient weight to guidelines] because they can't." He added however, that "I don't agree that NCSC guidelines are wrong in law." A Perth silk noted that guidelines were not given much weight as the courts "are not interested and they are not [therefore] cited".

By and large, the same pattern of response was evident amongst the large law firm lawyers interviewed. An experienced Sydney solicitor pointed to the covert use which judges make of guidelines in reaching their decisions. As he put it, "in the course of the hearing the judges will go to great length to examine NCSC policy, but it rarely emerges in the judgment." This approach is likely to be adopted in view of the suspicion, if not outright hostility, with which guidelines seem to be approached by many lawyers. As another very experienced Sydney solicitor expressed that position, "the NCSC guidelines are often wrong. The courts should look at them but not

be terribly influenced by them. The legislation is to be interpreted according to what it says, not what the NCSC thinks it should say." A former regulator, now a practitioner, also pointed out that "the courts tend to regard them with some suspicion."

It is interesting to contrast the above views of professionals in the takeover industry with the views held by judges themselves. Our impression was that judges often felt that they were being kept under control by the legal profession and by prevailing legal ideologies, despite the preference of many judges to seek to adopt a more wide-ranging approach to the determination of cases. However, there are some significant differences in this regard between judges. As one Melbourne judge observed in regard to the use of NCSC guidelines, "I have taken notice of them but other judges would not." Another judge noted that "these guidelines must be regarded as relevant, they may be persuasive but never binding." Similarly, another judge pointed out that the guidelines were most useful for legal practitioners in that they could stop cases from getting to court. He added however, that "if they are drawn to the Court's attention they are taken into account. They are never binding; the normal rules of interpretation must be applied."

Another judge felt that "you can take [guidelines] into account where there is any ambiguity or where it is indicative of policy in the exercise of any discretion." One of the few judges to express a strong view in favour of the use of guidelines said: "I use them quite a lot to get a better feel for the area. If the guidelines matched the legislation, for me they would prevail. That is not a legalistic approach but the guidelines are probably more authoritative than Hansard." However many judges reported that they had never or only rarely been asked to consider the content of guidelines.

At best, it seems that guidelines are, in the words of an experienced Melbourne commercial law judge, "regarded with respect and provide a background of expertise. The NCSC generally is helpful and it is recognised that they deal with this full time. It is not proper to use [guidelines] in a judgment; they cannot be used to justify a decision." At the end of the day therefore, the views of judges did not differ significantly from those of others in the industry. It would be interesting to compare the attitudes of judges in this regard with those which might be held by members of a non-judicial takeover panel, should such a panel ever come into existence. But, if the prevailing attitude found amongst professional advisers is any guide, a takeover panel is unlikely to take any radically different approach, from that adopted by judges, to the use of NCSC guidelines in takeover matters.

B. WHAT OF THE USE OF MINISTERIAL STATEMENTS?

We also asked if a different approach was taken by judges to the use of Ministerial statements on the economy as factors which might influence their interpretation of the Takeovers Code. Not unexpectedly, there was

an almost unanimous response to the effect that such statements were not given any weight, although Second Reading speeches might be taken into account in the event of ambiguity. As one judge noted, "in construing the statute only the words are important. If there is any ambiguity, then a ministerial statement may be persuasive." Apart from the use of Second Reading speeches, ministerial statements were apparently not relied upon. One judge, fairly characteristically, told us that "such statements are irrelevant, unhelpful and not persuasive"; and another said that "they are of little use in this field." This led us to consider whether it is appropriate for judges to give any weight to the likely consequences which might flow from their decision in a takeover case.

It is interesting to note that judges tended to take quite radically different views on the issue of whether they should have regard to the wider consequences flowing from takeover decisions. At one extreme was the view that this did not occur or was not appropriate, what might be called the "judges must apply the law" argument. At the other extreme was the view that judges should indeed consider the wider consequences, what might be called the "consequentialist reasoning is legitimate" argument. There did not seem to be an intermediate view in this regard.

C. THE 'JUDGES MUST APPLY THE LAW' ARGUMENT"

Thus, some judges said that consequentialist reasoning in takeover matters "did not occur as a court is not a place where you can consider issues like that" and, that "the adversary system does not allow the judges to consider the consequences, but only to determine questions of law and fact. Judges can only look at the consequences if required to do so by the Code." Other judges of this persuasion expressed the view that "it is difficult to conceive of a takeover case where this is relevant. The question is whether or not a set of takeover documents is valid" , or that "judges have to apply the law to the issues they are called on to decide. You could [only] take consequences into account in a discretionary matter such as an injunction [application]." Another judge even expressed the opinion that "it would be a bit dangerous [to consider consequences of takeover decisions]."

D. THE 'CONSEQUENTIALIST REASONING IS LEGITIMATE' ARGUMENT

Almost an equal number of judges adopted the view that consequentialist reasoning was legitimate, in contrast to the more narrow conception of the judicial role. We were informed that to do this "is always appropriate and legitimate. Economic and social considerations are pointers in ascertaining purpose. Parliamentary policy is important, barristers are slowly learning this." A Federal Court judge also told us that "judges should always consider the wider consequences especially in takeovers." A New South Wales Supreme Court judge observed that "if the

Code is ambiguous, the court can look at the wider consequences to avoid a ridiculous or harmful effect."

Probably the most thoughtful observation in this regard was offered by a commercial law judge in Victoria who told us that "it is legitimate to look at the consequences of where an interpretation leads. If the result is incongruous it makes you wonder about the intention of Parliament. The law has to work in society. The judge cannot go off and make law in any way he wants; his decision must take into account what is taking place outside the courts. This can always be adjusted by the appeal court." Another senior Victorian Supreme Court judge observed that "judges should always consider the consequences when exercising discretions. Courts are not there to frustrate the law but to facilitate it." Another Victorian commercial law judge affirmed that "it is very important to do this. That is why I do not take a legalistic approach as some of my colleagues do." Finally, a Western Australian judge observed that "I am sure that is right. Inevitably you do. So, it is highly desirable to know what the implications are." It seems then, that whilst there is a strong adherence to legalism amongst judges hearing Australian takeover cases, there are at least some who take a broader view of the ambit of the judicial role in takeover cases. Were the views of the latter group of judges to assume ascendancy, which is probably unlikely without a change in the legislation itself, we might expect to find a substantially different kind of result flowing from takeover decisions. A narrow legalistic approach to the Takeovers Code is, arguably, also out of touch with the intention of the Parliament when enacting this legislation, and the resultant narrowing of the interpretation of the Code owes much to the role of the legal profession in determining the scope of judicial thought in this area.

E. THE RESORT TO NORTH AMERICAN JUDICIAL AUTHORITIES

We asked respondents how much reliance they placed upon American judicial authorities and approaches to takeover litigation. Despite the fact that the BHP defence litigation relied upon American arguments, it seems that this did not come to much. Most believed that this is because the Takeovers Code was largely "homegrown" and not based upon American models. Most silks did not admit to having used American precedents in Australian takeover cases. Solicitors were more influenced by American takeover strategies than by American case law. As one large law firm Melbourne lawyer put it, "the case law from the US has no influence, but the strategies have been influential." Merchant bankers also thought that there was little scope for greater use of American judicial authorities. Turning to the judges, whilst most said that they would be prepared to entertain American authorities which were cited by counsel, there was also a strong view that the different statutory frameworks in the two countries were such that American authorities had to be approached with caution.

As one judge put it, "there is some scope but also some danger in using US cases because the statutory basis is different." Another expressed the view that "in my experience the US authorities are not very helpful as the judicial approach is radically different from ours." In any event, American authorities seem to be rarely cited except by a small group of counsel. Perhaps this is in part due to the limited access which is available to these cases to most lawyers and some judges. The general lack of interest in reliance upon Canadian and United States judicial authorities is unfortunate in view of the fact that North American cases provide a rich source of conceptual material regarding many areas of corporate law. We found only one prominant silk working in this area who reportedly placed heavy reliance upon such authorities.

V. PREDICTING THE OUTCOME OF TAKEOVER LITIGATION

The predictability of outcomes in takeover litigation may be a factor which affects the impact of such litigation upon the courts and their administration. If, for example, takeover litigation is seen to be totally unpredictable, or if it differs substantially in this regard from other types of litigation, there may then be a case for the adoption of a different approach by the courts to the handling of such litigation. This might include devoting more scarce judicial resources to fast-tracking, the creation of a specialist commercial law list for takeover cases (where such a list does not already exist) and seeking other ways to streamline the processing of such cases. We explored this issue by asking a number of questions about the predictability of such cases, the extent to which the attitudes or orientations of judges in takeover matters might be predicted and the extent to which other factors, such as the cost of takeover litigation might affect the course of such litigation or its settlement.

We began by asking lawyers how well they thought they could predict the outcome of takeover litigation. Lawyers mostly thought that takeover litigation was more unpredictable or even harder to predict than other types of litigation; the 'takeovers are unpredictable' view. The next most common approach was to suggest that takeover litigation was not all that different from other types of commercial litigation. Probably the main differences were the time pressures which apply more to takeovers than they do to other areas; what might be called the 'takeovers are essentially no different' view. Finally, a few lawyers actually thought that takeover litigation was either quite predictable or easier to predict than other types of litigation. This was not a very strongly held view, and might be called the 'takeovers are more predictable' view.

A. THE 'TAKEOVERS ARE UNPREDICTABLE' VIEW

As we saw, this was the most commonly expressed view amongst lawyers. As one Melbourne Queen's Counsel explained, "in takeovers the

outcome is unpredictable as you don't know what the facts are going to be. People fight these cases now regardless of the chances of winning. People are prepared to punt if they can get a quick answer and so all commercial litigation has become unpredictable." One Perth lawyer observed that in this regard takeover litigation "is an absolute lottery." One reason for this lack of predictability was, according to a Sydney lawyer, due to the fact that "there are so many parties." Another explanation which was offered was that "it is not easy because your client doesn't tell you the full story." Also, it was thought that problems in predicting outcomes were enhanced by the fact that "the law is unclear and badly drafted." Yet another reason offered for greater problems of prediction was that "you are not dealing with the intrinsic merits of the case, but just a question of a flaw in the documents." Prediction will therefore be possible "only if you have a fairly obvious flaw."

One factor which was often linked with the view that takeover litigation was unpredictable was the perceived attitude of judges in takeover matters. As one Melbourne silk saw it, one reason for this unpredictability was that "the judges' approach over the last 15 years has changed. They decide who is morally right and then work toward that result. If you have the high moral ground you are 90% of the way home." This same judicial attitude was reported by a Perth silk when he observed that "all judges can quickly decide who is wearing the white hat." Other lawyers made similar observations. For example, one Melbourne partner observed that "you get a feel for some judges, even if it is only that they are unpredictable. [Judge X] decides early who wears the white hat." This means that lawyers never really know until they get into court how a case will proceed. Because of this, we were told that cases often were withdrawn after the first day in court, as soon as the judge's attitude became apparent, even if the lawyers believed that legally they had a good case. This theme emphasising the unpredictability of judges was often raised. As one experienced corporate lawyer noted, "no one can accurately predict this; it depends very much on the attitude of the judges." A Queen's Counsel observed that "all judges have different attitudes" and another said that the outcome "depends on who is the barrister and who is the judge." Judges were also seen to be "difficult to read"; or to be unpredictable due to their lack of experience or lack of knowledge of the law .

B. THE 'TAKEOVERS ARE ESSENTIALLY NO DIFFERENT VIEW'

The next most commonly expressed view was that takeover litigation was no different from other types of commercial litigation. As one experienced Sydney silk observed, "this depends on the issues; it is no different from any other litigation." Similar words were used by other silks. One also noted that "there is nothing special about takeovers." Fewer law firm lawyers were as confident as the silks in this regard, although one thought that "generally you have a feel for how strong or weak your case is.

This is the same with all litigation." Another partner observed that "takeovers are no different from other document based litigation." There is no doubt that there is often a great deal of documentary material in such cases and the problems of handling this are accentuated by the time pressures which takeovers impose. One partner told us that takeover litigation "is no different from other areas of litigation, but there is more pressure due to time." As a silk put it, "everything happens at an enormous speed, there is no discovery or interrogatories." However, in the relatively rare circumstances where takeover litigation became protracted, another partner thought that the problems of predictability were accentuated.

C. THE 'TAKEOVERS ARE MORE PREDICTABLE' VIEW

A small group of lawyers thought that takeover litigation was actually more predictable than other litigation, although this view was usually qualified in some way. A partner observed that it was possible to predict outcomes "reasonably well, but it depends on the issues and the judge." One partner added, "we are getting better" ,whilst another noted "we can occasionally predict the outcome, but not what the judge will say."

D. PREDICTING JUDICIAL ORIENTATIONS IN TAKEOVER MATTERS

Another approach to the problem of predicting the outcome of takeover litigation is to see if practitioners believe that it is possible to predict the general orientation of particular judges. Sometime this may not be very useful, as there may not be much scope for forum shopping or for seeking to have a case listed before another judge, as the urgency of takeover cases is often such that it is necessary to convince whoever happened to be the duty judge dealing with such applications for interlocutory or declaratory relief in commercial matters. Nevertheless, most lawyers thought that they had some ability to make at least a general prediction of the judge's likely orientation in a takeover case. Perhaps it would be a matter of professional pride to say otherwise, although these views were usually so qualified or vague that it is doubtful that judicial orientations are as predictable as some would hope. Some lawyers thought that this problem was no different from any other area of litigation .

Some Queen's Counsel however thought that it was possible to predict judicial orientations to some degree. As one answered, "it is possible, within limits." Another silk remarked that "everybody does, but how accurately?" Some silks were a little more confident, such as when one said "yes, in any area", and another replied, "yes, in all commercial matters." As one lawyer, who thought that it was possible to predict judicial orientations, said, "the big players know the judges and will adjust their practices accordingly."

Where there is more takeover litigation or where judges specialize on a commercial list, it seems that there is greater confidence in making such

predictions. But even here, there are differences between judges. As one silk observed, "I have won before [Judge X] what I believed I would lose before [Judge Y]." However the amount of takeover litigation in a jurisdiction is a significant factor in allowing predictions to be made with any accuracy. As one Sydney lawyer noted, "there is more litigation in Victoria and this makes it more evident." In contrast, we were told that "in Perth it is a bit hard as there is no commercial list" and that "in WA it is unpredictable because of the judges' lack of experience." We might then ask if there is a prevailing judicial orientation amongst Australian takeover judges.

VI. JUDICIAL ORIENTATIONS - THE TENDENCY TOWARDS LEGALISM

The vast majority of the lawyers interviewed thought that the prevailing orientation to be found amongst judges in takeover cases was one which could be described as that of "legalism." Judges overwhelmingly agreed with this view of their approach to takeover law, and moreover were prepared to defend this approach quite vigorously. Of the 20 lawyers who answered this question only about 4 or 5 felt that there was no prevailing orientation amongst judges, or at least none that they had observed. The majority largely based their view on the vision of the Takeovers Code as compelling the judges to adopt a largely legalistic approach. Sometimes legalism was supplemented by what was described as a commercially pragmatic approach, a formalistic approach , or by a deliberate attempt to encourage settlements. Thus, on the question of relief one lawyer observed that judges take a more commercial approach although in their interpretation of the statute and of documents their approach was seen to be very much a legalistic one. A solicitor summarized the prevailing view held by the lawyers when he said that "the words of the statute demand legalism. Solicitors expect legalism and drive the courts to legalism." As a Queen's Counsel answered, "probably legalism, as the Code is a precise legal formula which doesn't say much." Nevertheless, it was often said that there were differences in approach taken by judges in different jurisdictions, despite the fact that they had the same statutory language to interpret in each place. One nationally active silk observed that "Western Australian judges are non-interventionist; NSW judges are much less so and Victorian judges are in between. All judges are legalistic because it is a legalistic code." Another view was that "in Melbourne the judges want to be involved, but in Sydney they say go away. Melbourne judges favour disclosure and so perhaps favour the target company."

The question of legalism was also put to the judges themselves, when we asked why the courts had adopted such a legalistic approach in respect to takeover matters. Only one of the judges interviewed argued that "the courts have not adopted a legalistic approach." He added, "we try to

breathe the commercial ethic." A Perth judge however answered that "it is an absurd criticism of a court to say it takes a legalistic approach; it is there to interpret and apply the law. When the law is framed in terms of prohibitions it will be interpreted narrowly." This was in effect a defence of legalism as the only option available to the courts in takeover matters. A Sydney judge reflected the more conventional view of the majority of judges, even if he did so more emotionally than most, when he observed that "courts adopt a legalistic approach to all legislation. Dixon said that was the only way to be a judge. When you deal with a new Act you have to find the intention of Parliament. The only way to do this is to look at what was said. The fundamental principle of the Act is to ensure a fair market." Equally strident in defending legalism was a Melbourne judge, when he answered "Yes, it is legalistic. In a democracy judges have enormous power and good judges will ensure that they do not exercise political power. Judges should not legislate as they are not appointed by or accountable to the people. If a judge decides a case based on a 'just' result this is tyranny. So judges must decide cases by reference to the law, and bend over backwards to make sense of it. A court ought to be legalistic." Views such as these were echoed time and again.

Reasons for the powerful grip of legalism upon the Australian judiciary in takeover matters were offered by a number of judges, although some stressed that this approach did not differ from that adopted by judges in other areas. For example, legalism was relied upon because "often the issue is legalistic, the construction of a document or the statute. The statute is highly convoluted and hence produces legalism. There is no discernible policy behind the statute." This judge also added that "legalism arises through the absence of non-legal assistance." The main influence upon the judiciary seems to be the legal profession which, according to many judges, demands a legalistic approach from the courts. As one judge observed, "the legalistic tradition of the profession leads to a legalistic rather than a words oriented approach." Furthermore, the adversary system itself was seen as contributing to a legalistic approach on the part of the judiciary. As one judge put it, "this is an almost inevitable outcome of the adversary system. The courts must act in this way to create certainty. If there is going to be a Code, it must result in commercial certainty."

The Takeovers Code was pointed to by many judges as compelling a legalistic approach by them. One judge replied that, "yes, there is a legalistic approach as some judges feel that if Parliament has gone to such length to bring in such a massive Code, it is enough to show compliance with the letter if not the spirit of the Code." Another judge added, "That's what the courts are for. Courts would be vehemently improper if they were anything but legalistic. The CASA requires a legalistic approach." Similarly, a Perth judge also observed that "in this area it is difficult not to be legalistic; the Code is drafted so as to demand a legalistic approach."

Another said that with increasing legislative complexity, increasing legalism seems to be inevitable. Ultimately, it seems that judges are constrained to adopt a legalistic approach by a range of influences from the profession, the adversary approach and the content of the legislation itself. As one judge succinctly expressed the problem, "what are the alternatives?" This is at least so in respect to the interpretation of the Takeovers Code, although a more commercially pragmatic approach may be adopted by some judges in respect of remedies. However, this may not allow for as much flexibility as it might seem.

One difficulty here might arise in discerning the precise purpose to be achieved by the Takeovers Code. When asked if it was appropriate for the courts to adopt a more purposive approach in interpreting the Code, most judges agreed that this was desirable, but often made comments such as the following: "you get a bit lost in the CASA trying to find the purpose. The legislature can never make up its mind as to what it wants to do" or, that "the CASA is not an easy statute from which to devise a purpose, apart from the broad regulatory purpose." However, the purposive approach which most judges agree should be followed, was seen as being appropriate, "provided the language of the statute permits it" and provided that the court has time to adopt such an approach. As one judge observed, "if the court had time to stand back and look at broader issues, a purposive approach would be possible. Takeover cases are urgent and encompass only a small area. The court relies heavily on counsel." It was often said that there was more scope for the adoption of a purposive approach by the regulatory agencies, such as the NCSC.

VII. TAKEOVER CASE LAW AND TAKEOVER STRATEGIES

A final issue in examining the courts and takeover litigation is the extent to which the efforts devoted to the area of takeovers have served to clarify or develop this body of law. To some extent, it could be argued that considering the judicial and legal professional resources devoted to this area, it is not unreasonable to expect that the law might have become more certain and predictable. This, however, does not seem to have been so, except perhaps in a very few areas. We began by asking lawyers and regulators "how much have takeover cases affected the development of takeover strategies?"

Many interviewees saw the Bell takeover attempt of BHP as a landmark in the recent history of takeover litigation in this country. A litigation lawyer has, since then, been seen by many to be an essential part of any team of takeover advisers. As another lawyer put it, "Bell/BHP changed the whole complexion of takeovers." Although many pointed out that vigorous resort to takeover litigation as a defence was relied upon by many companies before the Bell/BHP saga, this particular litigation seems to have served to legitimize litigation as a tool in the takeover defence

armoury. When before it would have been seen to be a questionable response, a corporate regulator remarked that "BHP showed people how to play dirty." To some extent this may represent, as some Melbourne respondents pointed out, an Americanization of takeover strategies in Australia. One lawyer explained that "techniques have had to change but strategies have not. Litigation now plays a major role but it is not the solution."

Nevertheless, specific illustrations of the way in which takeover strategies have changed were more difficult to find. Most changes seem to relate to refinements to the details of Part A Statements, questions concerning the intentions of bidders, questions of associates and in respect to expert reports. One of the problems seems to be the small number of reported cases arising specifically under the Takeovers Code. There have been less than a hundred reported cases since the Code came into operation in May 1982. Most takeover related decisions by the courts have not been reported as they have primarily involved applications for declarations or injunctive relief. One lawyer described the takeover jurisprudence which has developed during the 1980s as "a bewildering set of single instances. No coherent ideology has emerged." A Queen's Counsel thought that takeover strategies have only been affected by the cases "in a small way." However, it was suggested that takeover strategies had changed in regard to the relief which was sought from the courts. The regulators were even more convinced that the cases had not done much to affect takeover strategies. As one put it, "the cases have only trimmed the edges"; another observed that litigation "has not done much yet [to affect takeover strategies]. There have been no significant changes as a result of the litigation, but the CAC's practice is shaped by litigation." Again, there seemed to be considerable difficulty among the regulators in providing illustrations of the kind of changes which have occurred as a consequence of the litigation.

We asked the judges whether they were "satisfied that the takeover cases have allowed the courts to clarify and develop the law in relation to takeovers?" About a quarter of them could point to some real clarification or development in takeover laws which had emerged during the 1980s. Most thought that there had not been any such clarification or development and a number simply did not know or were uncertain. The explanations given help to reveal why takeover litigation has become such a useful device in spoiling takeover efforts. The lack of predictability of the likely judicial interpretation of takeover law and its related development, despite the substantial judicial and legal resources devoted to this area, could be seen as a disappointing aspect of the recent history of corporation law in Australia.

But, this may not be very unusual in the broad area of corporate law. As one judge remarked, "it has not been clarified. As in so many areas, litigation does not mean clarification." Another judge replied, "I don't

know that they differ in this respect from any other commercial cases." One reason for this was put by a Victorian judge when he observed that "it is difficult to clarify when you do not know the purpose of the Act." Another judge explained that, "there is no vision ahead, you are just battling with words". A Victorian judge added that "if the system was satisfactory it would not need much development. It should be clear what was intended." One judge, who thought that there had been some clarification and development of the law observed that this had occurred only "at a great expense in time and effort, which might have been avoided by taking a different approach in the first place." The difficulties faced by judges are reflected in the reply of a judge who said, "I have always had the feeling that there must be a simpler way of regulating takeovers." It is difficult not to agree with this proposition.

All that seems to remain in the area is "a wilderness of single instances." Indeed, we were frequently told that the main reason why it had not been possible to clarify or develop the law was because most cases turn on their particular facts. This was the view of one judge who noted that "the area is still unexplored as most cases are answered on the facts. The urgency of cases means that the material presented to the court is not as good as it might be. There is pressure for a quick decision so judgments are not as finely honed as they could be." The effect of this upon one Perth judge was striking; as he put it, "I cannot remember any cases." A factor which also contributed to the lack of development of the law was that so many of the cases required judges to exercise discretionary powers, or as one judge noted, "it cannot be clear when the judge has discretionary powers." As another judge also put it, "all you do is answer problems as they arise." Perhaps the final words in this regard should be left to a Sydney commercial law judge who observed that "there is no ultimate merit to debate in takeovers. The court cannot decide whether or not it is a good idea to sell shares for $x or that your management team is a good one. Takeover issues are always procedural and adjectival. There is no other forum except the auction block to deal with takeovers." As he also said in another context, it is important to remember that takeover litigation is only "the background music for an auction."

VIII. CONCLUSIONS

A central issue discussed in this article has been that of the commercial sensitivity of the judiciary. On the whole, it seems that there is a demand for more commercially experienced and aware judges. Many would say, however, that a good part of the work of judges in takeover matters is basically legalistic in nature, because of the kinds of questions brought to the courts and due to the nature of the Code. Despite this, it is often the case that judges are not fully aware of the real issues at stake in takeovers and that more commercial experience could improve their capacities to

deal with these cases. To some extent, this sense of commercial realism can be obtained from sitting on the specialist commercial law lists for a reasonable amount of time. However, not all judges have such opportunities, and, in any event, such lists do not exist in all jurisdictions, due probably to the lack of sufficient takeover matters and similar work in some of these jurisdictions. Even in Sydney and Melbourne, the number of specialist takeover practitioners is remarkably small, so that it is not surprising that there is not a substantial commercial law bench in other jurisdictions.

Nevertheless, despite the desirability of a more commercially experienced judiciary, a broadly held view amongst interviewees in this study was that the judiciary is actually coping fairly well with the cases that come before it. Suggestions that there should be a takeovers panel to replace the courts in takeover matters were not well received by most of those that we interviewed. The lack of objectivity, independence, authority and ability in deciding complex matters were frequently alluded to in criticisms of a takeover panel to replace the courts. There is no good reason to doubt the validity of this view. This suggests that the appropriate measures would be to seek to reform the commercial law courts, rather than to seek to displace them from this area.

Due to the problems of predicting the outcomes of takeover litigation and the tendency of judges to adopt narrow legalistic interpretations of the Takeovers Code, it seems that the NCSC and/or its successor, needs to be given the resources and abilities to seek to assist in the development of more predictable policies and laws in this area. This might include the provision of the resources to allow it to come to the assistance of the courts more often than it is now able to do. In view of the observations of the judges and legal practitioners, reported in this article, this may well be the best hope for the development of takeover law in this country. Whilst the courts must of course have the final say in this matter, the regulators should be allowed to regulate and not have their hands tied, as has occurred in many ways in this broad area in recent years. In this regard, there is ground for concern that courts can effectively ignore the policy guidelines which have been developed by the NCSC and widely applied by the corporate community. There is little prospect that Australian courts will ever abandon their traditionally legalistic approach to policy and turn to consider seriously the views of the corporate regulatory authorities. It may well be necessary to amend the Code if any progress is to be made in this regard. Although the Eggleston Committee principles which influenced the development of the Code are well known, it appears necessary to make their policy underpinnings more prominent. This could perhaps lead to the Code being used to better achieve its objects of protecting and informing shareholders rather than being employed as it mainly is at present in what amounts to institutionalised pettifoggery.

Finally, this study has sought to make a contribution to the contemporary understanding of judicial method in commercial cases and the constraints under which the judiciary operates in dealing with takeover matters in particular. Whilst clearly demonstrating a deep commitment to legalism as the prevailing ideology of commercial law judges, this ideology is narrower than it might otherwise be due to the extent to which the legal profession is able to discipline the bench to refrain from straying too far from the narrow literalist confines of the statute in this area. The lack of reliance upon purposive or consequentialist reasoning on the part of the bench is due in no small measure to the influence of the profession and the complexity of the legislation being interpreted, as well as to the tactical uses which are made of the courts in the area of takeovers. Surprisingly, judges never saw these manipulations of the courts as constituting an abuse of process, although some expressed strong antipathy to the business ethics of the litigants themselves. However, the power of legalism is such that these sentiments seem to have little effect upon the willingness and the capacity of the judges to take a more activist approach in interpreting Australian takeover legislation.